Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

DAVID SCHUDEL; DANIEL GLASS; TIMOTHY SCHUDEL, SANDRA SCHUDEL, husband and wife, and the marital community composed thereof; KATHRENE RAE (HOWELL) FROESE; and, CRAIG A. THOMPSON; DEBORAH GUARAGNA-WILLIAMS,

Petitioners,

v.

GENERAL ELECTRIC CO., a foreign corporation; KAISER ALUMINUM AND CHEMICAL CORPORATION, a foreign corporation,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Does the retroactive application of amended Fed.R.Civ.P. 50 and 59 impermissibly violate substantive rights of parties protected by the principle of finality of judgments?

II. Should this Court provide clarification for the courts below of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)?

III. Should an appellate decision which reversed a trial court's admission of expert causation opinions be allowed to stand where the appellate court obviously failed to employ the "abuse of discretion" standard deemed applicable in such reviews by this court's opinion in *General Elec. Co. v. Joiner*, ___ U.S. ___, 118 S.Ct. 512 (1997)?

IV. Does the "abuse of discretion" standard require that an appellate court, before reversing a trial court's admission of causation opinions under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), give consideration to the pretrial offers of proof and other related evidence presented to and considered by the trial court in addition to the trial testimony of the experts whose opinions are at issue?

V. Is *Schudel v. General Elec. Co.'s* holding, that expert testimony to be admissible must be supported by peer-reviewed scientific articles on the particular injury, inconsistent with other Ninth Circuit decisions, other circuit court of appeals decisions, and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)?

LIST OF PARTIES

Petitioners are Deborah Williams (a Plaintiff in the District Court and an Appellee in the Court of Appeals), David Schudel, Timothy Schudel, Sandra Schudel, Daniel Glass, Craig Thompson, and Kathrene Froese (Plaintiffs in the District Court and Appellants in the Court of Appeals). Additional Plaintiffs below filing separate petitions are John and Ruth Hopkins and Merlin Carlson, Jr.

Respondents in this court (Defendants in the District Court and both Appellee and Appellants in the Court of Appeals) are General Electric Company and Kaiser Aluminum and Chemical Corporation/Kaiser Aluminum Corporation, who were Defendants, Appellants and Appellees both below, hereinafter jointly referred to as "GE".

LIST PURSUANT TO RULE 29.6

According to its prior corporate disclosure statements, the General Electric Company is a publicly held corporation with no parent companies. Its subsidiaries and affiliates are General Electric Capital Corporation; General Electric Credit International, N.V.; Montgomery Ward and Company, Inc.; General Electric Capital Preferred Asset Corporation; CAMCO, Inc. (Canada); General Electric Capital Services, Inc.; GECC Financial Corporation (Hawaii); General Electric Capital Canada, Inc.; GNA Corporation; Mercur Bank (Austria); Imaging Financial Services, Inc.; and Dart V. Kraft, Leasing Corporation.

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Kaiser Aluminum and Chemical Corporation, a wholly owned subsidiary of Kaiser Aluminum Corporation, has equities securities which are publicly held. Kaiser Aluminum Corporation's parent, Maxxam, Inc., has debt and equity securities which are publicly held, and affiliates with either publicly held equity or debt securities are Maxxam Group, Inc.; the Pacific Lumber Company; Scotia Pacific Holding Company; and Sam Huston Race Park, Ltd.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on July 23, 1997, for the reasons enumerated herein.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals, Ninth Circuit, that gives rise to this petition is published at 120 F.3d 991 (9th Cir. 1997), and in this appendix as App. 1. By order filed November 24, 1997, the Ninth Circuit denied the petition for rehearing and suggestion for rehearing *en banc*. App. 2. The judgment dated July 13, 1994 is at App. 4. The opinion and amended judgments entered by the trial court on November 25, 1994, following the defense post-trial motions are at App. 3 and 5 respectively. A January 17, 1995 order certifying appeal is at App.6.

JURISDICTION

This case was removed from state court on diversity jurisdiction pursuant to 28 U.S.C. § 1332(a)(1). The judgment of the District Court was entered on July 13, 1994. The decision of the Ninth Circuit Court of Appeals was filed July 23, 1997, and rehearing was denied by an order dated November 24, 1997. This petition for certiorari has been filed within 90 days of entry of the denial of the petition for rehearing, and hence this court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES, RULES, AND CONSTITUTIONAL PROVISIONS INVOLVED

The statutes, rules and constitutional provisions involved are lengthy and thus set forth in full in App. 7.

STATEMENT OF CASE

Petitioners Deborah Williams, Kathrene Froese, David Schudel, Tim Schudel, Daniel Glass and Craig Thompson,[1] brought a negligence claim against Appellants General Electric Company and Kaiser Aluminum and Chemical Corporation for damages. Petitioner Sandra Schudel, wife of Tim Schudel, alleged loss of consortium only.

All Plaintiffs but Mrs. Schudel were employees of Qualified Personnel Inc. QPI was hired to provide workers to General Electric (GE) to assist GE in the cleanup of PCBs at Kaiser's Trentwood facility in Spokane, Washington. Plaintiffs all developed various neurological and respiratory problems during and after their unprotected exposure to a multitude of organic solvents and other federally and state regulated hazardous chemicals which GE had them use in the cleanup, including TCA and PERC.[2]

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[1] Plaintiffs John and Ruth Hopkins and Merlin Carlson, Jr. will be filing separate petitions in this court by and through their separate counsel.

[2] The hazardous chemicals were principally of two types – Organic solvents and caustic detergents. Trichloroethane (TCA); Perchoroehtylene (PERC); Naphthalene; Trimethylbenzenes; 1,2,4 – Trimethylbenzene (Xylene); Sodium Hydroxide; Aryl Sulfonate; Phosphate; Silicates; Chelate (EDTA-type); Alkyl aryl Polyether; Phosphate ester; Sodium Tripolyphosphate; Surfactant Nonylphenoxpoly; Nono and Diakly Acid Phosphate; Ethylene glycol; Monobutyl ether; Cycohexanal; Monochanolomine; C9-C12 Paraffins and C9-C12 Cycloparaffins, in addition to other chemicals, were used. These hazardous chemicals were being mixed with other chemicals such as "409" and "Wiley's" driveway cleaner, then put in 409 spray bottles.

Ms. Deborah Williams was hospitalized upon return to Vancouver, Washington, with severe symptoms of organic solvent poisoning. Ms. Williams and the other Plaintiffs were exposed to 5-10 times the permissible exposure limits set by OSHA.[3] TCA and PERC are controlled by government regulations because of their known hazards.

After leaving the hospital Ms. Williams was treated by a number of doctors, including Dr. William Morton, M.D., a professor of occupational and environmental medicine at Oregon Health Science University. Dr. Morton had extensive experience and scientific publications in the field of toxic exposure to hazardous chemicals. He testified on a more probable than not basis that Ms. Williams suffered from toxic encephalopathy and severe pulmonary injuries as a result of this unprotected, overexposure to known hazardous chemicals.[4]

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[3] These regulations include requiring the use of appropriate pre-planning, continuous air monitoring, ventilation, training, respirators, medical examinations and clothing; none of which were done or provided by GE.

[4] At the time of the exposure, Deborah Williams experienced rash, bloody noses, headaches, coughing (productive of blood) and difficulty breathing. Once back to Vancouver, she went to the hospital with respiratory distress. Evidence established that since the exposure she has had a persistent cough, shortness of breath, confusion, memory loss, mood swings, irritability, personality changes, and depression. Evidence at trial was that she is essentially housebound and unemployable, that she will need medication to assist her in breathing for the remainder of her life, and that she needs help even with her day to day responsibilities as a mother because of her difficulty with her memory and confusion. While Ms. Williams, a petite woman, may have been hit harder by this poisoning, the other Petitioners herein suffered from many of

A jury returned verdicts for the Plaintiffs.[5] Judgment was entered on the verdicts on July 13, 1994. The versions of Fed.R.Civ.P. 50 and 59 applicable at the time required any post-trial motions thereunder to be "served" or "served and filed" not later than 10 days after entry of judgment. Defendants *filed* their motions under Fed.R.Civ.P. 50(b) and 59(b) on the 10th day following entry of judgment. GE did not timely *serve* its post trial motions on counsel for Petitioners or counsel for Plaintiffs Hopkins. GE timely served counsel Marcia Meade who only represented Merlin Carlson. Further, GE did not file a notice of appeal, nor did any other party, within 30 days of the original date of judgment.

The trial court did not act under its Rule 59(d) authority to grant a new trial within 10 days of entry of judgment. It did, however, rule on Defendant's post-judgment motions four and a half months later on November 25, 1994, despite Petitioners' challenge to the jurisdiction of the trial court to rule on said motions due

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the same symptoms in varying degrees. All of these Petitioners (except Mrs. Schudel) had symptoms that medical science recognized as signs of poisoning from solvents. Because the *Daubert* issues presented by this Petition focus only on Petitioner Williams, with all other Petitioners joining only as to the first question presented herein, the factual description of injuries and damages sustained by the other Petitioners herein is substantially abbreviated.

[5] The jury's verdicts for the Petitioners hereto were: Deborah Williams – $1,907,783; Kathrene Froese – $1,459,332; David Schudel – $1,130,711; Tim Schudel – $1,051,270; Sandra Schudel – $50,000; Daniel Glass – $956,146; and, Craig Thompson – $556,199. The jury deemed the injuries and damages to the other 3 Plaintiffs represented by separate counsel from this poisoning to have been substantial as well.

to Defendant's failure to timely serve the same. In ruling on GE's Rule 50(b) motions, the court determined that a physician's testimony supporting several of the verdicts had been improperly admitted necessitating a grant of JMOL to GE on the cases of Dave Schudel, Tim Schudel, Sandra Schudel, Daniel Glass, and Craig Thompson. Despite GE's waiver, by its failure to object to the form of the special verdict, the trial court granted Defendants' request for a new trial with regards to the Kathrene Froese, John and Ruth Hopkins, and Merlin Carlson cases. The trial court denied JMOL, or a new trial, to GE on Deborah Williams' verdict and judgment. In making this decision, the trial court rejected GE's challenge to Ms. William's expert opinions on causation, concluding that Dr. Morton's methodology was scientifically reliable.

On December 27, 1994, 167 days after entry of judgment, GE filed its first notice of appeal, appealing the Deborah Williams' judgment. The trial court entered findings certifying appeals from the new trial granted by its order dated November 25, 1994 under Fed.R.Civ.P. 54(b) on January 17, 1995. On January 24, 1995, GE filed a second notice of appeal as to Ms. Williams' judgment. Notices of appeal were timely filed following the trial court's November 1994 and January 1995 order described above on behalf on Plaintiffs Schudel, Schudel, Schudel, Froese, Glass, Thompson, Hopkins, Hopkins, and Carlson.

This Court filed an order amending Fed.R.Civ.P. 50 and 59 on April 27, 1995, changing the requirement that "*service*" or "*service* and filing" of Rule 50 and Rule 59 shall occur not later than 10 days after the entry of judgment. The amended rule was ordered effective December 1, 1995, to "all proceedings and civil cases

thereafter commenced and, insofar as just and practicable, all proceedings and civil cases then pending". It provided that such motions shall be *"filed"* no later than 10 days after entry of judgment.

On July 23, 1997, the Ninth Circuit Court of Appeals issued its opinion in this case. It concluded that although GE had *not* timely served the Rule 50 and 59 post-trial motions on Petitioners, it was "just and practicable" to retroactively apply the amended rules. The appellate court further ruled that it lacked jurisdiction to review the District Court's grant of JMOL and new trial as to Kathrene Froese and dismissed her appeal. It reversed the grant of JMOL as to David Schudel, Tim Schudel, Sandra Schudel, Daniel Glass, and Craig Thompson, and remanded their cases. It found that the trial court had erred in admitting Deborah Williams' neurological expert testimony on causation. It vacated Ms. Williams' judgment, reversed the denial of the motion for new trial as to her claims, and remanded.

On August 5, 1997, Williams, Froese, Schudel, Schudel, Schudel, Glass, Thompson, Hopkins, and Hopkins filed timely petitions for re-hearing and suggestion for hearing *en banc*. On November 24, 1997, the 9th Circuit entered an order denying the petitions for re-hearing and suggestion for hearing *en banc*.

On December 15, 1997, this court decided *General Elec. Co. v. Joiner*, ___ U.S. ___, 118 S.Ct. 512 (No. 96-188, 1997), ruling that the standard for appellate review of a trial court's decision to admit or exclude expert testimony under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), is "abuse of discretion."

SUMMARY OF ARGUMENT

There are compelling reasons for granting a writ of certiorari in this case because the Ninth Circuit has erred in two major respects and has, in so doing, entered a decision in conflict with decisions of other United States courts of appeals on the same important matter, so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power, decided important federal questions that have not been, but which should be, settled by this Court, and decide important federal questions in a way that conflicts with relevant decisions of this Court.

Concerning the first question presented, this court's 4/27/95 order for amendment of Fed.R.Civ.P. 50(b) and 59(b) changed the requirement that "service" of post-trial motions occur not later than ten days after judgment to a requirement that "filing" occur not later than ten days after judgment. The order provided that it was effective 12/1/95 to "all proceedings in civil cases thereafter commenced and, insofar as just and practicable, all proceedings in civil cases then pending". The Ninth Circuit below impermissibly applied these changes in the rules retroactively to judgments filed July 13, 1994 which had already vested because, as the Ninth Circuit itself found, defense post-trial motions were not *served* within the 10 days as Fed.R.Civ.P. 50(b) and 59(b) then required. Since no appeal was filed by any party within thirty days of the July 13, 1994 entry of judgments, this retroactive application of amended rules has created the illusion of a revival of jurisdiction that was in fact lost when the defense post-trial motions were untimely served. It has wrongly enabled post-judgment trial and appellate review and reversal of vested judgments, is compelling all of the

Petitioners to this Petition as identified above to retry their claims, and is exposing them to further lengthy and unwarranted appeals. The Ninth Circuit's decision below, in regards to an important federal question concerning a retroactive application of an amendment of civil rules in violation of the principle of finality of judgments, is inconsistent with relevant decisions of the Ninth Circuit and this Court and has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

Concerning the balance of the questions presented, all of which primarily relate to Petitioner Willams' case, the following arguments apply. The Ninth Circuit granted Defendants a new trial on Petitioner Williams' case. It ruled that the trial court had erred in allowing Petitioner's experts to testify to their conclusions on toxic encephalopathy causation because they were not, in the appellate court's opinion, "scientifically reliable." The Ninth Circuit opinion discussed and criticized *solely* the trial testimony of the experts without reference to extensive pretrial offers of proof or the trial court's decision making process. The Ninth Circuit focused on its belief of a need for peer-reviewed, chemical and dose specific literature to support Ms. Williams' experts opinions on toxic encephalopathy causation and found that concern determinative, showing no deference to the trial court's belief, reached after a consideration of the entirety of the record including the pretrial offers, that these challenged opinions on causation were scientifically reliable and were properly admitted. The appellate court's reversal of this trial court ruling was rendered just prior to issuance, and hence without consideration, of this Court's opinion in *General Elec. Co. v. Joiner, supra* (decided 12/15/97). The

appellate decision is inconsistent therewith in that it obviously failed to employ an "abuse of discretion" standard in concluding that the trial court inappropriately admitted such evidence under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The Ninth Circuit decision below is also in conflict with a number of decisions of other United States courts of appeals on the same important matter, as is discussed in more detail below.

ARGUMENT

A. RETROACTIVITY.

1. The Ninth Circuit's opinion below, based upon a retroactive application of amendment to Fed.R.Civ.P. 50 effective after Petitioners' judgments were final, implicates most of the considerations for acceptance of certiorari.

Schudel et al[6] submit that the retroactivity analysis of the appellate court below regarding Rule 50 conflicts with other decisions of the Ninth Circuit and with Supreme Court precedent, most notably *Landgraf v. U.S.I. Film Products*, 511 U.S. 244 (1994), and *Hughes Aircraft Co. v.*

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[6] Hereinafter "Schudel," as used in argument concerning the first question presented by this Petition, will refer to David, Tim and Sandra Schudel, Daniel Glass, Craig Thompson, Kathrene Froese, and Deborah Williams, all of the Petitioners herein. Similarly postured are John and Ruth Hopkins, who are filing a separate petition. In regards to the issues involved in Question I, *supra*, Schudel also adopt by reference the more detailed arguments and issues presented by Hopkins' Petition for Certiorari to be separately filed by attorney Thomas C. Phelan.

United States ex rel William J. Schumer, 520 U.S. ___, 138 L.Ed.2d 135 (1997) [which reversed another Ninth Circuit opinion on the issue of retroactivity] and other cases as discussed below. This Court can, by accepting review of this case, help establish uniformity of decisions within the Ninth Circuit, resolve conflicts between the opinion below and this Court's existing decisions on retroactivity, and clarify for lower courts why, how, and when amendments to federal rules may or may not be applied retroactively. Further, the error of the appellate court, arising from retroactive application of an amended rule which revives jurisdiction previously expired such that Petitioners' substantial and vested judgments have been vacated, is a departure so far from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

2. The Presumption against Retroactivity.

The appellate decision below properly ruled that GE's post-trial motions were untimely. *Schudel v. General Elec. Co.*, 120 F.3d 991, 994 (1997); *citing, Magnuson v. Video Yesteryear*, 85 F.3d 1424, 1431 (9th Cir. 1996). Under pre-amendment Rule 50, failure to serve and file post-trial motions on or before the tenth day following verdict deprives the trial court of jurisdiction to entertain and rule on the motions. *Browder v. Department of Corrections*, 434 U.S. 257, 264, 98 S.Ct. 556, 561, 540 L.Ed.2d 521 (1978); and *Carlisle v. United States*, 517 U.S. 134 (1996), citing to *United States v. Lock*, 471 U.S. 84, 101, 85 L.Ed.2d 64, 105 S.Ct. 1785 (1985) [a rule which would authorize untimely filings of post-trial motions would foster an attitude that if "one day late filings are acceptable, ten day late filings might be equally acceptable, and so on and the cascade of

exceptions would engulf the rule erected by the filing deadline . . . "]; *see also, McConnell v. MEBA Medical and Benefits Plan*, 778 F.2d 521 (9th Cir. 1985); and, *Carter v. United States*, 973 F.2d 1479, 1488-89 (9th Cir. 1992). As a result, judgment, by operation of law, vested in Petitioners Schudel on the 31st day after entry of judgment.[7] Absent retroactive application of Rule 50 as amended, these Petitioners would be entitled to have their verdicts reinstated, as the trial court lost jurisdiction to rule on GE's post-trial motions.

Nonetheless, the appellate court concluded that amended Rule 50 should be applied retroactively, stating only that there would be "no prejudice" to Schudel and others by retroactive application of the amended Rule 50 simply because the parties had "briefed the substantive, non-jurisdictional arguments" raised in the appeal. *Schudel, supra*, 120 F.3d at 994. This holding, relying almost exclusively on two Ninth Circuit decisions, *Schroeder v. McDonald*, 55 F.3d 454, 459-60 (9th Cir. 1995), and, *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 888 (9th Cir. 1994),[8] failed to recognize that the retroactive application of amended Federal Rules of Appellate Procedure which

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[7] It vested on the 31st day following judgment as no party filed a notice of appeal within the 30 days required by Fed.R.App.P. 4, and because untimely post-trial motions do not toll the time within which to file a notice of appeal. *See e.g., dissenting opinion of* Justice Rehnquist in *Needham v. White Laboratories, Inc.*, 454 U.S. 927 at 929-30 (1981).

[8] *Schroeder, supra* and *Wallis, supra*, are easily distinguished. These cases authorized the resurrection of *prematurely* filed notices of appeal by retroactive application of amended appellate procedural rules. Those rulings make sense in that a premature notice of appeal does not adversely affect the strong policy favoring finality of judgments.

occurred in those two cases is totally distinguishable from the retroactive application of amended Rule 50 which occurred here. Quite to the contrary of the claim that "no prejudice will result from application of the amendments", retroactive application of amended Rule 50 deprived Petitioners of their substantive right to a judgment which had become final.

The decision below in this case is directly at odds with the Ninth Circuit's opinion in *Chenault v. United States Postal Service*, 37 F.3d 535 (9th Cir. 1994) which at 537-538, in discussing the retroactive application of a statute, held:

> A newly enacted statute that shortens the applicable statute of limitations may not be applied retroactively to bar a plaintiff's claim that might otherwise be brought under the old statutory scheme because to do so would be manifestly unjust. [Citations omitted]. Conversely, we held that a newly enacted statute that lengthens the applicable statute of limitations may not be applied retroactively to revive a plaintiff's claim that would otherwise be barred under the old statutory scheme because to do so would "alter the substantive rights" of a party . . . [9]

Absent an express declaration that a statute/rule is to be applied retroactively, the appropriate default rule is that there is a strong presumption *against* its retroactive application. *Hughes Aircraft, supra* at 138 L.Ed.2d at 146. In this case, there was no clear expression of retroactivity – this Court's order provided that the Rule 50 amendments were to be applied only to cases commenced after

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[9] *See also, United States v. Bacon*, 82 F.3d 822, 824 (9th Cir. 1996) [statute should not be applied retroactively if it affects the "substantive rights" of a party].

December 1, 1995 and "insofar as just and practicable", to "all proceedings in civil cases then pending" (phrasing discussed further *infra*).

Recently, this Court in *Hughes Aircraft v. ex rel Schumer, supra,* in reversing the Ninth Circuit, held that defining a statute as "jurisdictional" and thus an "exception to the general *Landgraf* presumption against retroactivity" is erroneous, noting:

> Indeed, the Ninth Circuit went further, holding that, absent a clear statement of Congressional intent, there is a strong presumption *in favor of* retroactivity for jurisdictional statutes. 63 F.3d at 1517. The Ninth Circuit simply misread our decision in *Landgraf*, for the only "presumption" mentioned in that opinion is a general presumption *against* retroactivity.

138 L.Ed.2d 146 [emphasis original].[10]

Jurisdictional statutes only affect "where a suit may be brought, not whether it may be brought at all." *Id.* at 146. The *Hughes Aircraft* opinion noted further that if a rule/statute:

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[10] As noted, in *Landgraf* at 128 L.Ed 2nd at 259-60 n. 29, a simplistic analysis of classifying a statute as "jurisdictional" and therefore automatically retroactive, such as was done in this case, is erroneous:

> Our orders approving amendments to federal procedural rules reflect the common sense notion that the applicability of such provisions ordinarily depends on the posture of a particular case . . . we do not restrict the presumption against retroactivity to cases involving "vested rights".

See also, Hodges v. Snyder, 261 U.S. 600, 603, 43 S.Ct. 435, 436, 67 L.Ed. 819 (1923); *Pennsylvania v. Wheeling and Belmont Bridge Comp.,* 59 U.S. 421 437, (18 How.) 15 L.Ed. 435 (1852).

> [C]reates jurisdiction where none previously existed; it thus speaks not just to the power of a particular court but to the substantive rights of the parties as well. Such a statute, even though phrased in "jurisdictional" terms, is as much subject to our presumption against retroactivity as any other.

The reasoning of *Hughes Aircraft* and *Chenault* are directly applicable to this case. Petitioners Schudel had a substantive and fully vested right to a judgment, which became final on the thirty-first day after judgment. Retroactive application of Rule 50 in this case is not only unjust, it creates jurisdiction for the trial court to entertain untimely post-trial motions where none previously existed. As such, the opinion of the Ninth Circuit is in direct contravention of the holdings of *Hughes Aircraft* and *Chenault*.

3. Finality of Litigation.

In addition to the presumption against retroactivity articulated in *Landgraf* and *Hughes Aircraft*, there is an equally strong competing interest long settled in the law regarding the finality of litigation. *Browder v. Dept. of Corrections, supra; see also, Beam Distilling Co. v. Georgia*, 501 U.S. 529, 541-42 (1991). By retroactively applying a civil rule to a case already completed, the Ninth Circuit has taken away the vested, substantial rights which the Petitioners had in their judgments, contrary to the dictates of *Hughes Aircraft*. The opinion below, "much like extending a statute of limitations after the pre-existing period of limitations has expired, impermissibly revives a moribund cause of action, see, *e.g., Chenault v. U.S. Postal Service*, 37 F.3d 5353, 537, 539 (CA 9, 1994)." *Hughes*

Aircraft, 138 L.Ed.2d at 146.[11] Retroactive application of the amended Rule 50 sanctions the conduct of the dilatory party at the expense of impermissibly impairing the successful litigants' vested, legal right to commence collection of their final judgments.[12]

4. "Just"; "Then pending"; "Practicable".

Applying amended Rule 50 retroactively in this case was unjust. The service requirement of the former Rule 50 and 59, spoke, in a sense, to the power of the Court, but it also spoke, more directly, to the obligations of the parties to raise, or waive, post-trial motions or objections, in a

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[11] *See also, United States v. 51 Pieces of Real Property in Roswell, NM*, 17 F.3rd 1306, 1312 (10th Cir. 1994); and *United States v. One Piper Cherokee Aircraft*, 37 F.3rd 489, 493 (9th Cir. 1994).

[12] If the applicable period of time within which one could file an appeal, 30 days, were violated by a party filing on the 31st day, and thereafter, the rule was amended to extend the applicable filing period to 45 days; could it be logically argued that an appeal filed outside of the applicable statutory time would be revived by the amended federal rule? What if Rule 50 had been amended differently, such that the 10 day time limit were shortened to 5 days. Assume that GE had timely served its Rule 50 motions within the 10 day time frame then permitted. Can it be logically argued that the amendment of Rule 50 a year and a half after the efforts to preserve the post-trial motions were made should be applied retroactively to result in a conclusion that the motions were untimely served? Given that *Hughes Aircraft, supra*, holds that amendments affecting jurisdiction may be applied prospectively only and may not, as was done in this case, be used in a retroactive manner so as to impair substantive rights of parties, an amended rule should no more be applied retroactively to revive jurisdiction already lost than it should to deprive a court of jurisdiction rightfully present.

timely manner. It created a bright line for when and how the non-moving party's rights to final judgment vest. Just as a subsequent amendment to a statute of limitation will not revive a time-barred claim,[13] subsequent amendment of a rule of civil procedure should not revive time barred post-trial motions. This is especially true in light of the substantive, vested rights of Petitioners in this case to their judgments, which had become final once the trial court lost jurisdiction to entertain the untimely served post-trial motions.

The Ninth Circuit's finding of no prejudice to Schudel and others in the case by its retroactive application of amended Rule 50 belies the facts. Petitioners were deprived of a substantive right to substantial verdicts awarded after a 54-day jury trial and 9 days of jury deliberation. That right was taken by the trial court lacking jurisdiction based upon ill-preserved motions by GE. Only the application of amended Rule 50 makes this unjust result possible. In essence, the Ninth Circuit rewarded GE for non-compliance with the rules then in effect while simultaneously destroying the vested right of Schudel in their judgments.

A case in the posture of this case was not a civil case "then pending" as of December 1, 1995, as contemplated by this Court's order amending the rule. Because untimely post-trial motions resulted in no tolling of the

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[13] *See also, Bulgo v. Munoz*, 853 F.2d 710, 715 (9th Cir. 1988) (declining to give retroactive effect to amendment of statutes of limitations which would have revived plaintiff's barred claim); *Davis v. Valley Distrib. Co.*, 522 F.2d 827, 830 (9th Cir. 1975), *cert. den'd*, 429 U.S. 1090, (1977) (general rule that subsequent extensions of statutory limitation period will not revive a claim previously barred).

time within to file an appeal, and no filing of a notice of appeal occurred within 30 days of judgment, Petitioners' judgments were final and vested. Jurisdiction of the courts over this case other than for purposes of collection proceedings had expired – the case was over, not pending, in December of 1995 when the new rule was effective.

Looking at the word "practicable", as used in this Court's order, it also was chosen, presumably, so that trial and appellate courts would *not* try to retroactively apply the amendments to revive or recreate trial court jurisdiction already lost. "Practicable" is defined to mean "capable of being done, feasible . . . " in The New Lexicon Webster's Encyclopedic Dictionary of the English Language, 1989 Ed. *Browder, supra,* and other cases make it clear that missing such a deadline ends the trial court's jurisdiction. The amended rule cannot feasibly be applied retroactively where the trial court's jurisdiction had ended a year and five months previously. Retroactive application of the amended rule here was something "capable of being done" only by throwing out any concern for the principle of finality of judgments that this Court has so diligently protected. In a discussion of a different rule where *certiorari* was denied because of substantially different and distinguishable facts, Justice Rehnquist stated:

> I would therefore grant a writ of certiorari in this case and reverse the Court of Appeals' decision. The Federal Rules of Appellate Procedure govern all cases on appeal in the federal system, and patchwork exceptions to them will do far greater harm to the system than an occasional random departure on a point of substantive law.

See, dissenting opinion of Justice Rehnquist in *Needham v. White Laboratories, Inc.*, 454 U.S. 927 at 932 (1981).

The Ninth Circuit Court of Appeal's decision is in direct conflict with this Court's decisions in *Landgraf* and *Hughes Aircraft* and also is in conflict with decisions within its own circuit (see *Chenault v. U.S. Postal Service, supra*).

B. *DAUBERT*

1. Need for Clarification Among the Circuits.

This Court's decision in *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993) has been the subject of a remarkable amount of appellate litigation. In the federal system alone there is obviously a vast difference of opinion between not only different panels of the Ninth Circuit, but a vexing debate amongst justices writing opinions in other circuits as well, concerning how *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993),[14] was meant to influence the admissibility of expert witness opinions. Put simplistically, on one hand, there are what could be called the followers of the *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1315 (9th Cir.) ("*Daubert II*"), *cert. denied*, ___ U.S. ___, 116 S.Ct. 189, 133 L.Ed.2d 126 (1995) line of thinking,[15] that the admission of expert testimony is considerably more *difficult* given the Supreme Court's decision in *Daubert* (see *Daubert II*). On the other, different judges and appellate panels employ a

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[14] Hereinafter simply "*Daubert*"; references to the Ninth Circuit's second opinion issued in 1995 will be to "*Daubert II*".

[15] Such as the decision below, *Schudel v. General Elec. Co., supra*. Another example consistent with this more restrictive view is *Claar v. Burlington Northern R. Co.*, 29 F.3d 499 (1994).

more expensive reading of *Daubert*, an example of which can be seen in *Hopkins v. Dow Corning Corp.*, 33 F.2d 116 (9th Cir. 1994),[16] concluding that it was the Supreme Court's opinion that expert testimony should be more *easily* admitted.[17] Williams contends that under either interpretation of *Daubert* the trial court in her case correctly exercised its discretion in concluding that her expert testimony met the test. But a decision in this case from this Court on what was intended in *Daubert* would greatly assist both trial and appellate courts in making more uniform decisions on the admissibility of expert opinions and would clarify this Court's intentions in this area.

Certiorari in this case should be granted because the proper standard of review was not employed in this appeal, as will be next discussed, and as this case presents an opportunity for this court's continuing refinement and clarification of *Daubert*.

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[16] By way of another example, see *Ambrosini v. LaBarraque*, 101 F.3d 129 (D.C. Cir. 1996) and other cases later discussed herein.

[17] As of the July 1997 Supplement to 60 Am.Jur. Trials 1, in an article entitled *The Daubert Challenge to the Admissibility of Scientific Evidence*, no less than 120 articles are identified as arising out of legal periodicals and references concerning *Daubert*. A glimpse even at only the titles of some of these law review articles and other papers reveals the disparate perceptions which the varying authors have of what *Daubert* and its progeny have meant for litigators in the tort field, *e.g.*, at the two extremes, are Davis, *Admissibility of Expert Testimony After Daubert and Foret: A Wide gate, A More Vigilant Gatekeeper*, 54 La.L.Rev. 1307 (May 1994), as contrasted with Maliver, *Out of the Fryeing Pan and Into Daubert: Trial Judges at the Gate Will Not Spell Relief for Plaintiffs*, 56 U.Pitt.L.Rev. 245 (Fall 1994).

2. Appropriate Standard of Review.

The appellate court's opinion, filed on July 23, 1997, was written before this court's opinion in *General Elec. Co., v. Joiner, supra,* was issued. In *Joiner,* this Court held:

> *[A]buse of discretion* is the proper standard by which to review a District Court's decision to admit or exclude scientific evidence.

118 S.Ct. at 519 [emphasis added].

The Ninth Circuit's discussion of the sufficiency of Petitioner Williams' experts' opinions on causation fails to identify what standard of appellate review is being undertaken. The Ninth Circuit's failure to employ an "abuse of discretion" standard of review is perhaps understandable in light of the fact that *Joiner* was not decided until some five months later, but the failure to employ the proper appellate standard on review of the District court's decision to admit the experts' opinions resulted in prejudical error in Petitioner Deborah Williams' case.

3. No Deference Shown Trial Court.

This Court in *Daubert* several times emphasized that the inquiry envisioned by Rule 702 is a flexible one. *Daubert,* 509 U.S. at 593, 594, 597. Such flexibility for the trial court's exercise of its assignment, mandated by Rule 702, corroborates the need for an appellate tribunal reviewing the trial court's rulings to give substantial deference to the district court's rulings.

> [W]e adopted deferential review to afford the District Court the necessary flexibility to resolve questions involving multifarious, fleeting, special, narrow facts that utterly resist generalization.

Koon v. United States, 116 S.Ct. 2035, 2047 (1996). What a provision such as Rule 702 embodying trial-court discretion does not contemplate is for a court of appeals to "substitute its own judgment for that of the District Court." *Piper Aircraft Company v. Reyno*, 454 U.S. 235, 257 (1981) [forum non conveniens determination]; *see also, Braun v. Lorillard, Inc.*, 84 F.3d 230, 237 (7th Cir.) [exclusion of hearsay and/or Rule 803 reviewed], *cert. den.*, 117 S.Ct. 480 (1996). Admissibility rulings commonly require the court to make "fact-intensive, close calls." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990).

A long history of appellate rulings on a variety of issues has reaffirmed the broad extent of deference due the trial judge's ruling under an abuse of discretion standard. *Stillwell and Bierce Manufacturing Company v. Phelps*, 130 U.S. 520, 527 (1889); *Congress and Empire Spring Co. v. Edgar*, 99 U.S. 645, 658 (1879); *Chateaugay Ore and Iron Co. v. Blake*, 144 U.S. 476, 484 (1892). *See also, e.g., Gila Valley G. and N. R. Co. v. Hall*, 232 U.S. 94, 103 (1914); *Inland and Seaboard Coasting Company v. Tolson Company*, 139 U.S. 551, 559 (1891); *Montana Ry. v. Warren*, 137 U.S. 348, 353 (1890); *cf., Spiller v. Atchison, T. and S.F.R. Co.*, 253 U.S. 117, 130 (1920).

Despite the plethora of federal appellate and Supreme Court decisions which emphasize the wide discretion, if not the "great latitude" which must be accorded the trial court's decision,[18] the Ninth Circuit in this case ignored the trial judge's ruling and undertook

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[18] *See, United States v. Dorsey*, 45 F.3d 809, 813-14 (4th Cir.), *cert. denied*, 115 S.Ct. 2631 (1995); *Gier v. Educational Service Unit*, 66 F.3d 940, 942-4 (8th Cir. 1995); *Duffee v. Murray Ohio Mfg. Co.*, 91 F.3d 1410, 1411 (10th Cir. 1996).

its own abbreviated analysis of Dr. Morton and Dr. Goldstein's opinions expressed during the trial. In this case, the trial judge had the better opportunity to take into consideration not only the trial testimony, but all the affidavits and other related evidence submitted by Petitioner Williams and others in support of her experts' testimony. The trial judge had a better opportunity to see and hear the experts and other witnesses testify, to see the pretrial and trial exhibits as they were each introduced and throughout the continuation of the case, to review and absorb much more than just the cold appellate record, and to properly employ the *Daubert* standard with respect to reliability.

4. Offers of Proof, Recognized Methodology Ignored.

The Ninth Circuit made no reference to Dr. Morton, Goldstein and Milhelm's extensive Offers of Proof filed prior to trial in response to GE's motion in limine brought under *Daubert*. *See, Schudel*, 120 F.3d at 996-7. They should have been given careful consideration by the appellate court for two reasons. First, the role of the trial court was that of a "gatekeeper." *Daubert v. Merrell Dow Pharm., supra*, 113 S.Ct. at 2798, 125 L.Ed 2d at 485. To properly fulfill that responsibility the trial court asked for and received offers of proof from the various medical providers. Since the trial court considered these Offers of Proof, the appellate court, before trying to second guess the trial court, obviously should have also. Second, Plaintiffs were not obligated to present once again, before the jury, all of the qualifications and underlying bases of their experts' opinions in the trial testimony of each expert. Fed.R.Evid. 705. Reliance by the reviewing court upon the

trial testimony of the experts alone, without consideration of the underpinnings set forth in the totality of the Offers of Proof, is contrary to *Daubert* itself as well as to Fed.R.Evid. 705. This failure on the part of the appellate court to acknowledge and consider these offers of proof compounds its failure to employ an abuse of discretion standard on review.

In his offer of proof, Dr. Morton established in great detail that he specifically followed the methodology described in peer-reviewed texts and articles cited to the trial court, and that he was well within a recognized and appropriate scientific methodology when he concluded, more probably than not, that Ms. Williams suffered from toxic encephalopathy and RADS as a result of her unprotected exposure to organic solvents at the Kaiser plant.

The appellate court below also failed to give more than passing reference to Dr. Morton's testimony that the study of other organic solvents was scientifically reliable in assisting him in making his determination of the cause of Ms. Williams' injuries, and gave no deference to Dr. Morton's use of the differential diagnosis method as his basis for determining whether the Plaintiffs were injured by the unprotected exposure to TCA and PERC.

The differential diagnosis method begins with the taking of a detailed history and physical examination and thereafter the establishment of a set of potential diagnoses that are then eliminated one by one, through additional testing and a review of literature, in order to arrive at the ultimate diagnosis. The differential diagnosis process was confirmed as a scientifically reliable process by reference to peer-reviewed articles. The method also requires the review of scientific literature and the

examination of case reports of unprotected exposures to organic solvents. Neuropsychological testing of Ms. Williams was called for by this method, and was done. Dr. Morton described three universal symptoms or neuropsychological impairments that occur from unprotected exposure to organic solvents such as TCA and PERC – memory difficulties, deficits in concentration, and pronounced irritability (sometimes described as personality change). These were symptoms reported by Ms. Williams and other Plaintiffs, and confirmed by her neuropsychological testing. Dr. Morton eliminated the other potential diagnoses and concluded after following the differential diagnosis method that Ms. Williams had suffered injuries from her unprotected exposure to TCA and PERC.

As only one part of the differential diagnosis method, Dr. Morton established that it was appropriate to make a comparison of the effects which other organic solvents are known to have on the body in analyzing the harm that is likely to occur from the organic solvents TCA and PERC. His testimony and offer of proof established that it was scientifically reliable to conclude that the organic solvents at issue were the cause of Ms. Williams' injuries, following a proper undertaking of the differential diagnosis technique and methodology outlined above. Dr. Morton was a treating physician of Ms. Williams. Where a treating expert had established that he used a reliable methodology,[19] the trial court reasonably exercised its

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[19] *Daubert* advised the trial courts to focus on the experts *methodology*, not their *conclusions*. *Daubert*, 509 U.S. at ___, 125 L.Ed.2d at 484 ["The focus, of course, must be solely on principles and methodology, not on the conclusions that they

discretion in concluding that the doctors' conclusion, reasonably and logically derived from that process, was scientifically reliable. That decision by the trial court in this case was not an abuse of discretion.

Certiorari should be granted such that this court can ensure that Ms. Williams' experts' Offers of Proof and other underlying data supporting their testimony, overlooked by the Ninth Circuit in its opinion below, are properly considered on appeal, as they were by the trial court.

5. Inconsistent with *Daubert*.

The Ninth Circuit's reliance in this case upon an alleged absence of literature concerning TCA and PERC for the specific periods of exposure, at the specific dosages suffered by Ms. Williams[20] as the sole means of overruling the trial court's admission of Dr. Morton's

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generate"]. Juries should resolve differences in the conclusions of experts, not judges. *See, e.g.*, the reasoning of the court in *Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529 at 1535-36 (D.C. Cir.), *cert. denied* 469 U.S. 1062 (1984). *Accord, Reese v. Stroh*, 128 Wn.2d 300, 907 P.2d 282, 287 (1995); *Intalco Aluminum v. Dept. Labor & Ind.*, 66 Wn.App 644, 833 P.2d 390, 398-400 (1992); *Ambrosini v. Labarraque, supra*, 101 F.3d at 137-138. *Consider also*, Seventh Amendment, U.S. Constitution; and, 28 U.S.C. Section 2072(b).

[20] The Ninth Circuit below acknowledged that there are a number of peer-reviewed articles concerning the effects of organic solvents (such as TCA and PERC) on the human body, with exposures of considerably less time but at higher doses, and at considerably longer periods of time but at considerably lower doses. There were, within the record of this case, a number of case reports contained in peer-reviewed papers that documented injuries from organic solvents of the type received by Ms. Williams and the other Plaintiffs in this exposure.

testimony, is contrary to the direct edicts of *Daubert* itself. The concept that peer-reviewed studies of the specific organic solvents used at the precise dosages are the only relevant method of evaluating scientific reliability flies in the face of existing case law and the overwhelming evidence in this case. That factor is not an exclusive nor even an essential requirement; *Daubert* itself ensured that a trial court may look to a variety of ways to test admissibility of expert testimony.[21] This Court characterized such peer review in *Daubert* as a "pertinent consideration", "*not* dispositive". 125 L.Ed 2d at 483. The Ninth Circuit obviously failed to consider that other alternative methods may suffice, as there is no analysis of any other method in its opinion below.[22]

This case is not about a drug or other chemical about which can be found no relevant literature nor any case reports demonstrating that it may possibly cause human injury [such as the birth defects as were alleged in *Daubert, supra,* and *Lust v. Merrell Dow,* 89 F.3d 594 (1996)). Ms. Williams' case is about toxic chemicals which were and are a known health hazard, and for which specific guidelines have been published by OSHA concerning safe usage of the chemicals.[23] This is a case in

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[21] "Many factors will bear on the inquiry, and we do not presume to set out a definitive checklist or test." *Daubert, supra,* 509 U.S. at 593, 125 L.Ed.2d at 482.

[22] *Cf. e.g., Hopkins v. Dow Corning, supra,* in which a different Ninth Circuit panel which, on a record almost identical to the record in this case, concluded the trial court had appropriately exercised its discretion in admitting similar causation opinions concerning a different chemical.

[23] Of interest especially are GE's own publications, *Solvents and Safety, GE's Site Safety Manual,* and its own "MSDS's", which

which multiple experts testified that a "differential diagnosis" was an appropriate scientific method to resolve the causation issue.[24] These experts' opinions on the appropriateness of this procedure have been endorsed by a number of courts. *See, e.g., Benedi v. McNeil-P.P.C., Inc.*, 66 F.3d 1378, 1384 (4th Cir. 1995) ["we will not declare such methodologies invalid and unreliable in light of the medical community's daily use of the same methodologies in diagnosing patients"]; *McCullock v. H.B. Fuller Co.*, 61 F.3d 1038, 1044 (2d Cir. 1995) ["faults in his use of differential etiology as a methodology, or lack of textural authority for his opinion, go to the weight, not the admissibility of his testimony"]; *Ambrosini v. LaBarraque*, 101 F.3d 129, 141 (D.C. Cir. 1996) [use of differential diagnosis is appropriate methodology]; *United States v. 14.38 Acres of Land*, 80 F.3d 1074 (5th Cir. 1996) [trial court applied too stringent a reliability test, "*Daubert* does not create a special analysis for answering questions about the admissibility of all expert testimony", citing *United States v. Sinclair*, 74 F.3d 753, 757 (7th Cir. 1996)].

6. Ninth Circuit's Opinion Inconsistent with its own Decisions, Those of Other Circuits, and State Law.

As can be seen from a review of the cases cited in the prior section, the insistence by the Ninth Circuit opinion below that there be peer-reviewed (specific to the chemical and dosage) literature that these particular organic solvents caused the harm to Ms. Williams is inconsistent

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confirmed GE knew of the very risk of harm it was creating by not protecting these workers before the exposure even occurred.

[24] Dr. Morton; Dr. Lantsberger and Dr. Goldstein.

with the fact that the methodology used by Dr. Morton has been specifically endorsed by the Ninth and other circuit courts as being scientifically reliable. *See also, Hopkins v. Dow Corning, supra.*

A different panel in the Ninth Circuit in *Lust v. Merrell Dow Pharm., Inc., supra,* concluded that an expert's opinion was held to have been properly excluded where the expert claimed that he followed a recognized minority of teratologists in reaching his conclusions. Justice Farris correctly noted:

> (Dr.) Done could have convinced the district court that his methodology was nevertheless scientific if he had explained how he went about reaching his conclusions and had pointed to an objective source demonstrating that his method and premises were generally accepted by or espoused by a recognized minority of teratologists.

89 F.3d 594, 597.

Dr. Morton's use of the differential diagnosis methodology was ***never*** contested by GE. Rather, the entire premise of GE was that without more extensive peer-reviewed literature, the opinion of Dr. Morton could not be reliable. Prior to the Ninth Circuit's decision of Ms. Williams' case even the most conservative approach to the admissibility of expert testimony did not reach that far. *Daubert II, supra,* 43 F.3d at 1318-1319. Reversal of the trial court's decision on the admissibility of the expert evidence supporting Williams' judgment in this case, where the trial court considered the expert's qualifications and extensive experience, the methodology used by the experts, and the totality of the additional research, information, studies and other bases listed in the Offers of Proof, as contrasted with the Ninth Circuit's analysis

which looked to only one subissue of that process, is inconsistent with other appellate decisions and with *Daubert*.

CONCLUSION

For the foregoing reasons these Petitioners respectfully urge this Court to grant their Petition for Certiorari.[25]

DATED this 20th day of February, 1998.

Respectfully Submitted,

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[25] To any extent applicable, all Petitioners herein also adopt, in full, the arguments of Plaintiffs/Petitioners John and Ruth Hopkins and Plaintiff/Petitioner Merlin Carlson, Jr., insofar as questions presented, issues, arguments or authorities advanced in said parties' Petitions for Certiorari being separately filed relate to issues held in common with Petitioners herein. *See*, Rules of the U.S. Supreme Court, Rule 12(4).